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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 79

LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HINDS, DON MCGARVIE, AND BERNARD V. PROVENZANO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 84

RALPH ALSUP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 1502-1541) is reported at 210 F. 2d 732.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1954 (R. 1542), and a petition for rehearing was denied on March 22, 1954 (R. 1543). By order of Mr. Justice Douglas, dated April 15, 1954, the time for petitioning for a writ of certiorari was extended to May 21, 1954. The petition in No. 79 was filed on May 17, 1954, and the petition in No. 84 on May 20, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Petitioners were convicted of violation of section 1 of the Sherman Act under an indictment alleging, with full particulars, a conspiracy to restrain and suppress competition in the sale and distribution of plumbing and heating supplies to consumers in southern Nevada. The following questions are presented:

1. Whether the trial court properly instructed the jury as to the basis for determining whether the supplies involved were "in [interstate] commerce" within the meaning of the Sherman Act.

2. Whether the proof sustained the allegations as to "commerce."

3. Whether the evidence warranted the jury in concluding that petitioners conspired to divide the market and fix prices for plumbing and heating supplies.

4. Whether, under the facts charged and proved, petitioner in No. 84, a labor union official, was en-

titled to the immunity provided by section 6 of the Clayton Act.

5. Whether the court of appeals properly rejected as groundless petitioners' claims (a) that various rulings of the trial judge were erroneous, (b) that the trial judge manifested bias in favor of the Government, and (c) that Government counsel was guilty of prejudicial misconduct.

STATUTES INVOLVED

Section 1 of the Sherman Act (26 Stat. 209, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U.S.C. 1) provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 6 of the Clayton Act (38 Stat. 731, 15 U.S.C. 17) provides:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation

of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

STATEMENT

Under an indictment returned on March 27, 1951 (R. 3-13), petitioners were charged with a conspiracy and combination to restrain trade, in violation of Section 1 of the Sherman Act. Petitioners Las Vegas Merchant Plumbers Association and Merchant Plumbers Exchange, Inc., are trade associations in which the remaining petitioners are members. All of the other petitioners, with the exception of Ralph Alsup, are plumbing contractors whose places of business are located in southern Nevada. Petitioner Alsup is the business representative and financial secretary of a labor union, Local No. 525, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

Petitioners were tried before a jury in the United States District Court for the District of Nevada (Foley, D.J.) during the month of October, 1951, and found guilty as charged. The court of appeals affirmed the convictions, writing a de-

tailed and careful opinion (R. 1502-1541).

The indictment is in one count, charging a combination and conspiracy to suppress and eliminate competition in the sale of plumbing and heating supplies in restraint of the interstate trade and commerce therein. The period of time involved is August, 1950, to March 27, 1951 (the date of the indictment).

The trade and commerce involved is described in paragraphs 12-17 of the indictment (R. 7-10). It is there alleged that practically all plumbing and heating supplies used in southern Nevada are manufactuered out-of-state and shipped in interstate commerce from other states to the state of Nevada (par. 12); that plumbing contractors in Nevada are engaged in the business of distributing, selling, and installing plumbing and heating supplies for profit (par. 13); that plumbing contractors who are members of the two petitioner trade associations handle more than three fourths of such supplies in the southern Nevada market (*ibid.*); and that a major portion of all the plumbing and heating supplies distributed to that market is sold by plumbing contractors charged in the indictment (*ibid.*).

It is also alleged that southern Nevada plumbing contractors obtain more than forty percent of their supplies by direct dealings with and direct shipments from manufacturers and wholesalers located in other states (par. 14). The remainder of their supplies is purchased through southern Nevada wholesalers who acquire the commodities

from out-of-state sources for resale. Substantial quantities of the supplies purchased by the Nevada wholesalers are bought pursuant to prior orders received from plumbing contractors, and substantial quantities of the supplies purchased by the wholesalers are shipped directly from out-of-state points to plumbing contractors. Par. 15. Moreover, it is alleged, substantial quantities of the plumbing and heating supplies ordered by southern Nevada plumbing contractors are shipped directly from out-of-state points to job sites, where they are installed in buildings by the contractors (par. 16).

The indictment states further that consumers of plumbing and heating supplies do not ordinarily install them, but depend upon the services of a plumbing contractor; that the performance of these services by the contractor is necessary to the movement of the supplies in interstate commerce; that "plumbing contractors, including those named as [petitioners] herein, are conduits through which plumbing and heating supplies manufactured in and shipped from States of the United States other than the State of Nevada, are sold and distributed to the consuming public in southern Nevada"; and that the supplies "flow in a continuous, uninterrupted stream from their points of origin in States other than Nevada to their places of installation and use in buildings in southern Nevada" (par. 17).

The nature of the conspiracy is set forth in paragraph 19 of the indictment. It alleges, so far as is now material, that petitioners entered into a

continuing agreement, the substantial terms of which were as follows:

(a) That a person known as an "estimator" would be employed (initially by the petitioner Association and thereafter by the petitioner Exchange) to determine and fix prices which plumbing contractors would charge for jobs involving the sale and installation of plumbing and heating supplies;

(b) That plumbing contractors, before making estimates or bids on a job, would submit plans and specifications to the common "estimator";

(c) That plumbing contractors would adhere to the prices determined by the "estimator";

(d) That when two or more contractors proposed to submit bids on a particular job, the "estimator" would notify a so-called Allocation Committee, composed of plumbing contractors or their representatives, which would designate one of the contractors as the person to submit the low bid;

(e) That when a job was allocated, other plumbing contractors would submit complementary or factitious higher bids;

(f) That in order to enforce compliance with the allocation plan, petitioner Alsup would induce qualified plumbers and pipefitters to refrain from working on a job for a plumbing contractor who had not been designated by the Committee to perform that job.

It is further alleged that, during the period covered by the indictment, petitioners "have done those things which * * * they combined and

conspired to do" (par. 20), and that the necessary effect has been unlawfully to restrain and obstruct the flow of plumbing and heating supplies in interstate commerce in southern Nevada (par. 21).

The court of appeals found that the evidence convincingly supported the essential allegations relating to commerce and to the formation and implementation of the conspiracy (R. 1516-1521). It further found that there were no errors of law in the conduct of the trial (R. 1521 *et seq.*). The underlying evidence and the challenged rulings and instructions of the district court are discussed at appropriate points in the Argument.

ARGUMENT

1. Petitioners concede (Pet., No. 79, p. 50) that "[t]he allegations of the indictment in this case set forth a pattern of flow of goods in interstate commerce designed to come within decided cases of this Court."[1] They state further that the case

[1] Petitioners have completely abandoned the contention, advanced in the district court and in the court of appeals (see R. 1503), that the allegations as to commerce are insufficient to make out an offense under the Sherman Act. As the opinion of the court of appeals points out (R. 1510-1512), the allegations charging restraint of trade in commodities in the flow of interstate commerce are clearly sufficient. The opinion refers to a number of cases in which comparable allegations have been upheld. To this list should be added this Court's recent decisions in *United States* v. *Employing Plasterers Association*, 347 U.S. 186, and *United States* v. *Employing Lathers Association*, 347 U.S. 198. In the *Plasterers* case, this Court observed (p. 189) that "the complaint alleged that * * * a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they

was submitted to the jury on an "in commerce" theory (*ibid.*).[2] They urge, however, that the instructions based on this theory were inadequate, and that the proof was in any event insufficient to warrant the conclusion that substantial quantities of the supplies involved were in interstate commerce at the point where the restraints attached. They also argue that, assuming the commodities were in the flow of interstate commerce and the petitioners were engaged in price-fixing and allocation of jobs at the retail level, the court should have charged that there was a further obligation on the Government to establish that the burden on commerce was direct and substantial.

a. Since petitioners concede the sufficiency of the trade and commerce allegations summarized in the Statement, *supra*, pp. 5-8, it is difficult to see the basis of their assertions that the instructions on this phase of the case were inadequate. For an examination of those instructions demonstrates that the jury was carefully and fully informed that it should determine whether the Government had proved its essential allegations beyond a reasonable doubt.

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reached there at all." In the instant case, the indictment alleges with full particulars that a local group of people were to a large extent able to dictate (a) the prices at which builders and home owners might obtain for their use plumbing and heating supplies which had to reach Nevada through interstate trade if they reached there at all, and (b) the particular contractor who would be permitted to make the ultimate sale and perform the installation.

[2] In this respect, petitioners are in agreement with the decision of the court of appeals. See R. 1530.

Instruction No. 25 begins with the statement (R. 128):

> The indictment alleges that there exists a flow of commerce from manufacturers of plumbing and heating supplies located outside of Nevada to their places of installation and use in buildings in Southern Nevada and that the plumbing contractors are conduits through which these supplies manufactured and shipped from other states are sold and distributed to the consuming public in Southern Nevada. It is for you to decide whether this allegation is true beyond a reasonable doubt.

The succeeding paragraphs of that Instruction (R. 128-129) summarize paragraphs 12-17 of the indictment. The Instruction concludes (R. 130):

> These heretofore mentioned matters concerning the flow of commerce are not of themselves unlawful, but if you find these allegations as to commerce to be true, and if you further find beyond a reasonable doubt that the defendants agreed in advance of the shipment of these supplies into the State of Nevada to fix the prices at which they would be distributed and sold after the completition [*sic*] of that interstate journey, then I instruct you that such fixing of prices necessarily affected the free and untrammeled flow of such supplies while they were still in interstate commerce.

Petitioners criticize the instructions (Pet., No. 79, p. 30) on the ground that the court's summary of the allegations fails to use the words "flow in a continuous, uninterrupted stream," which appear in the indictment. But the language relating to a "flow of commerce," etc., appearing in the opening sentence of Instruction No. 25, plainly imports the requirement of continuity. Moreover, the succeeding paragraphs of the Instruction set forth the precise allegations of fact which, if true, would establish the continuity of the stream. The jury was told to determine, on the basis of the truth or falsity of these allegations, whether there existed a flow of interstate commerce from the out-of-state origins to the places of installation, and whether the plumbing contractors served as conduits through which this flow was channeled. The total effect of these instructions was to pose the "in commerce" issue for the jury with fairness and clarity. Certainly, no particular words or phrases are required of a trial judge explaining the issues of an antitrust case, and "no mechanical rule can be laid down to control [him] * * *. He must be free to exercise 'a well-established range of judicial discretion.'" *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 571.

It is also urged that the trial judge should have explicitly instructed the jury to take into account the fact that plumbing contractors do not ordinarily sell individual supplies in their raw form, but are "engaged in the business of installing plumbing and heating commodities as a portion of struc-

tures * * * being constructed within the State of Nevada" (Pet., No. 79, p. 31). However, the indictment charges (par. 13, R. 8) that petitioners are engaged in the business of "distributing, selling and installing plumbing and heating supplies," and the instructions (Instruction No. 25, R. 128) use the same language in summarizing the indictment. There was no necessity to go beyond this description and to ask the jury to determine specifically whether a sink or bathtub so changes its character when it is connected to a pipe and placed in a building that the person who installs it is no longer to be deemed a person engaged in the distribution of plumbing supplies. We recognize, of course, that the processes of assembly, fabrication, or manufacture may in some circumstances so fundamentally change the character of a commodity as to break the flow of commerce. See discussion in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 238-244. But it is plain that the jury could not have made such a finding here. As petitioners recognize, the component commodities of the installed plumbing and heating systems are not converted into new and different commodities; they are simply assembled or connected and put into place. There is, moreover, no question here of the possible effect of commingling supplies moving in interstate commerce with other commodities having a local situs. It is undisputed that all of the plumbing and heating supplies which the plumb-

ing contractors receive and install come from out of state.

b. In their attack upon the sufficiency of the evidence (Pet., No. 79, pp. 50-57), petitioners recognize (1) that quantities of plumbing and heating supplies are shipped directly from out-of-state points to plumbing contractors at job sites, and (2) that quantities of plumbing and heating supplies are purchased by Nevada wholesalers from out-of-state manufacturers in response to specific prior orders received from plumbing contractors. They suggest, however, that the quantities included in these two categories are not sufficiently substantial to sustain Federal jurisdiction under the Sherman Act. With respect to a third category—supplies shipped to Nevada wholesalers or plumbing contractors and held in stock for a period of time prior to actual installation and use—it is urged that the evidence does not permit the conclusion that there was a continuous and uninterrupted stream. We submit that there was ample evidence to sustain the verdict and that these issues as to the weight of the evidence do not in any event present a question of general importance warranting a second appellate review of the record.

Petitioners assert (Pet., No. 79, pp. 54-55) that the record shows shipments from out-of-state points to job sites "amount[ing] to $6,562.27 or approximately 1% of the total purchases of plumbing and heating supplies during the [eight-month]

indictment period." This statement is seriously in error. Thus, it completely disregards the fact that, during the indictment period, $42,801.53 worth of plumbing supplies were shipped directly from a Los Angeles supplier to the job site at which the Las Vegas Race Track was being constructed (Exs. 3 and 4, not printed; R. 352, 623, 628, 993). Discussing this shipment, the court of appeals stated (R. 1519):

> An order for $42,800 worth of plumbing supplies was shipped to the job site of the Las Vegas Race Track from a Los Angeles supplier, for use by a Los Angeles plumbing contractor, not a party to the conspiracy. The job had been allotted by appellants to one of their number but when the Los Angeles contractor received the contract award, two of appellants asked Alsup, the plumbers' business agent to "protect" them and for several months plumbers refused to work on the job. Here was direct evidence of the impact of the conspiracy on interstate commerce.

Adding this item, it appears that approximately $50,000 worth of shipments to job sites, rather than $6,000, took place during the period involved.[3] The percentage figure, on this basis, is approximately eight per cent rather than one per cent. Commerce in this volume plainly cannot be dis-

[3] Actually, there is other evidence on the same point which petitioners' statement fails to take into account. See R. 933, 941-942.

missed as *de minimis.*[4] Accompanied by proof of illegal restraint (see *infra,* pp. 19-21), these shipments alone would plainly warrant a finding of violation of the Sherman Act.

As petitioners concede (Pet., No. 79, p. 53), the record also shows that, during the indictment period, a Nevada wholesaler, Standard Wholesale Supply, purchased approximately $14,000 of plumbing and heating supplies from out-of-state manufacturers in response to special orders placed by Nevada contractors. These supplies, which moved without interruption to the contractors, must be added to the figures set forth in the preceding paragraph in determining the total amount of commerce which is indisputably interstate.

Petitioners would completely disregard all plumbing and heating supplies which were placed in stock—either the stock of a Nevada wholesaler or of a Nevada plumbing contractor—between the date of the original shipment from out of state and the time of installation in a Nevada building. The evidence shows, they argue, that stocked supplies remained "on the shelves * * * for substantial and varying lengths of time" (Pet., No. 79, pp. 51-52). They ignore, however, the testimony of the principal Nevada wholesaler that it

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[4] See *Montague & Co.* v. *Lowry,* 193 U.S. 38, 46; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 224, note 59; *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 225-226. Cf. *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178, 180, 184; *National Labor Relations Board* v. *Denver Building Council,* 341 U.S. 675, 683-684.

is his company's practice to keep inventory to a minimum and to place orders for merchandise at regular intervals in anticipation of the constant and recurring demand of the plumbing contractors to whom the commodities are resold (R. 1080). From this and other evidence, the jury could properly have concluded that the break in transportation occurring at the wholesale level was not the equivalent of a break in the commerce involved. Cf. *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 237-238; *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564, 570.

There is, in any event, a further flaw in petitioners' argument. The undisputed evidence shows that, of the total amount of supplies shipped to Nevada plumbing contractors, forty-six percent was sold and shipped directly by out-of-state suppliers to the contractors (R. 1518). Petitioners cannot dismiss this commerce from consideration by asserting that most of it went into contractors' inventories before being used on particular jobs.[5] For the conspiracy, if successful, was nonetheless one which would necessarily influence and control the course of that substantial segment of commerce (forty-six percent) moving directly from out-of-state suppliers to local contractors. The conspiracy which was charged (see

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[5] For present purposes, we pass the point that large quantities of the supplies which went into contractors' stock were destined for particular jobs and were merely held temporarily in inventory to conform to building schedules. See Exs. 1, 5, 29-32, 37 (not printed).

indictment, pars. 19(f), 21(b), R. 11-12) and proved (see *infra,* pp. 19-21) involved, not only price fixing, but a plan to divide business among the members of the "Association" and to withhold business from non-members by the employment of techniques of boycott. To the extent that it was effective, such a conspiracy necessarily channelized the flow of supplies to and among particular contractors (the conspirators) and dried up the flow of supplies to other contractors (the non-members of the "Association").[6] From an early date and with great consistency this Court has condemned as illegal under the Sherman Act combinations, enforced by boycott or other means, to cut off or otherwise restrain local trade outlets for goods sold or shipped interstate.[7]

The Government, of course, was not obliged to

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[6] It is, of course, unnecessary to evaluate the extent to which the conspirators were in fact successful in appropriating and dividing the business among themselves. "It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225, note 59. See, also, *Nash* v. *United States*, 229 U.S. 373, 378; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402.

[7] See, *e.g.*, *Montague & Co.* v. *Lowry*, 193 U.S. 38 (tiles); *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 48-49 (enameled ironware); *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U.S. 600, 611 (lumber); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 465 (women's clothes); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (motion pictures); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226 (taxicabs); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (news and advertising).

prove that all of the commerce subject to the restraints was interstate commerce. It sufficed to show that substantial quantities were of that character. The jury was fully warranted in concluding that such a showing had been made.

c. Petitioners argue at some length (Pet., No. 79, pp. 35-49) that the trial court erred in failing to instruct the jury that, if it found that the commodities involved were in the flow of interstate commerce and that petitioners were engaged in price fixing and allocation of jobs at the retail level, it should then determine whether the effect of those restraints was "direct and substantial" rather than "indirect and remote."

When restraints of trade operate upon goods which are still in the flow of interstate commerce, the effect, by definition, is a direct one. The cases from which petitioners seek comfort are cases in which the commodities themselves were not in interstate commerce and in which it was accordingly necessary to determine whether a prior or subsequent movement in interstate commerce was nevertheless "affected."

If petitioners' argument as to "substantiality" means that the volume of commerce involved must be something more than a *de minimis* quantity, there is no occasion for disagreement. As shown above, the indictment charged that the restraints operated on substantial quantities of goods in interstate commerce, and the evidence and the instructions to the jury were in keeping with these allegations. If it is meant, however, that the court's charge should have held the Government

to the requirement of showing in quantitative terms the burden on interstate commerce threatened or caused by petitioners' offenses, petitioners are plainly in error. Conspiracies to fix the prices of goods in interstate commerce (*United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397; *United States* v. *Masonite Corp.*, 316 U.S. 265, 276) and conspiracies to divide the market for such goods (*Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 241; *United States* v. *National Lead Co.*, 63 F. Supp. 513, 523 (S.D.N.Y.) affirmed, 332 U.S. 319) are *per se* unreasonable. The injury or threat of injury to commerce is conclusively presumed. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225, note 59.

2. Petitioners argue that the evidence as to conspiracy was insufficient to support the verdict. The jury, the district judge, and the court of appeals found to the contrary. And the lengthy record amply sustains the conclusion of the court of appeals that the evidence "concerning the nature of the conspiracy, [and] its operations" was "clear and convincing," and that such evidence "clearly supported the verdict" (R. 1521). There is no need for further review of the evidence by this Court.

The conspiracy had its inception at two meetings at which the individual defendants discussed the formation of an organization of plumbing contractors in Las Vegas "to figure out prices, to figure out ways and means of charging the work of contracting" (R. 520-521, 530). It was decided to set up a central estimating bureau to

which the plumbing contractors would refer jobs for estimating, and "that was the price that would be charged" (R. 521, 528). The estimating bureau was established (R. 532), a common estimator was selected (R. 521), and an allocation committee was set up to "allocate the jobs as they came through" (R. 531, 560, 642-643, 803). Petitioner Alsup, an official of the plumbers' union, was present at the first of these meetings, and when one of the plumbing contractors expressed doubt whether the scheme would work, Alsup told him that he (Alsup) thought he could make the scheme "work" because if people would not go along with it, "he was in a position to handle the men, to put them in a position where they would go along" (R. 523).

Shortly thereafter, the estimator began his duties of "estimating work for various plumbers" (R. 639, 640). When only one contractor was interested in a job, the estimator gave his estimate directly to that person (R. 642). When more than one contractor was interested, however, the estimator turned his figures over to the chairman of the Allocation Committee "for action by the Association" (R. 642, 643). In such cases, the estimator was informed of the decision of the Allocation Committee, and "the person who was indicated was to use the individual estimate that I had prepared" (R. 644). On the jobs which he had estimated, the estimator kept a record of the bids which the contractors submitted and the identity of the successful bidder (R. 652-656).

The record shows numerous instances in which, pursuant to the conspiracy, jobs were allocated,

prices were fixed, and collusive higher bids were submitted to protect the chosen contractor. Petitioners' discussion of the evidence as to conspiracy (Pet., No. 79, pp. 58-63) relies on isolated excerpts from the record, and gives nothing approaching an adequate picture of the facts upon which the jury's verdict was based.[8] The full picture, reviewed and summarized by the court below (R. 1519-1521), solidly supports the verdict.

3. Petitioner in No. 84 is the business agent of the local plumbers union. In addition to adopting the arguments of petitioners in No. 79, he makes the separate argument (Pet., No. 84, p. 12) that,

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[8] Thus, for example, petitioners' brief reference (Pet., No. 79, p. 61) to the allocation of the "Ward and Ward" job to petitioner Hynds fails to set forth the significant facts. The full story actually constitutes a dramatic example of the conspiracy in action. Without stating it in detail, the evidence as to this episode shows that the conspirators did operate in the agreed fashion to allocate the job to Hynds, that other contractors accordingly refrained from underbidding Hynds, and that a contractor who attempted to disrupt the scheme by submitting a lower bid withdrew that bid after he was threatened with a walkout of his employees by petitioner Alsup, the union official (R. 656-659, 753-755, 757, 799-800, 807, 861-862, 934, 936-937, 960).

Another example of the conspiracy in action was petitioners' attempt to protect the allocation of the plumbing work at the Las Vegas race track to one of the conspirators (R. 939-940). When that contractor failed to obtain the job because his bid did not meet the specifications (R. 880-881, 883), and the contract was awarded to a Los Angeles contractor (R. 878, 885), the unsuccessful conspirator asked Alsup for protection (R. 980). For several months thereafter, the Los Angeles contractor was unable to obtain plumbers from Alsup to do the work (R. 986-988), although during that same period he did obtain plumbers to work on an Atomic Energy Commission project in Nevada (R. 989).

by virtue of section 6 of the Clayton Act, he is immune from prosecution under the Sherman Act because his activities were "not in furtherance of any unlawful agreement or conspiracy," but were "solely in the interest of the union." This contention is without merit.

It is well settled that labor unions and their officials and members do not enjoy any blanket exemption from the Sherman Act. Once such groups "combine with non-labor groups," *United States* v. *Hutcheson,* 312 U.S. 219, 232, and "aid and abet business men to do the precise things which that [Sherman] Act prohibits", *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, 801, they come within the Act's prohibitions. Section 6 of the Clayton Act does not immunize labor unions and their officials who "aid and abet manufacturers and traders in violating the Sherman Act" by "fix[ing] prices and divid[ing] up markets." *Id.* at 810. See, also, *United States* v. *Employing Plasterers Association,* 347 U.S. 186, 190.

The trial judge applied this rule in charging the jury as to the test to be used in determining Alsup's guilt. He charged (R. 121) that a representative of a labor union cannot be found guilty of violating the Sherman Act as long as he "acts solely in the self-interest of the union and does not combine or conspire with a non-labor group," but that if such representative "does so combine and conspire with any group of businessmen and employers to aid and abet them to unlawfully fix

prices and control markets," it is no defense to say that such action is in furtherance of the self-interest of the union members as wage earners. Thus, when the jury found petitioner Alsup guilty, it concluded, in accordance with the court's instructions (R. 122), that he "did combine, conspire and agree with the other defendants that in order to enforce compliance with and adherence to * * * [an] agreement to fix prices and allocate bids * * * Alsup, would induce journeyman plumbers not to work on any job for any plumbing contractor other than one designated and agreed upon by the defendants to submit the lowest estimate or bid," and that his activities had not been "in furtherance of any legitimate objective of the union he represented * * *." As the court of appeals held (R. 1537), the evidence was plainly sufficient to support this conclusion. See, *e.g.*, R. 523, 757, 936-937, 980, 986-988.

4. Petitioners in No. 79 make a variety of other contentions, all of which were considered and rejected by the court of appeals as "without sufficient merit" to warrant discussion (R. 1541).[9]

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[9] Petitioner in No. 84 also argues (Pet., pp. 18-20) that the trial court improperly admitted hearsay testimony as to statements made by the common estimator. Although the common estimator was not indicted, he was, as the court of appeals held (R. 1539), either one of the conspirators or their agent. The court of appeals thus correctly concluded that his statements, made in furtherance of the conspiracy, were properly admitted against petitioner Alsup, either as an admission by a co-conspirator, or as a statement by an agent binding his principal (*ibid.*).

We consider the principal ones briefly.

a. Petitioners contend (Pet., No. 79, pp. 66-69) that Government counsel made improper remarks in his closing argument to the jury. They argue that, by drawing an analogy between the crime for which petitioners were on trial and the misdemeanor of passing a stop-light in an automobile, he suggested to the jury that conviction would carry a light penalty. The cited portion of the argument, however, shows that Government counsel used this analogy in explaining to the jury that specific criminal intent is not an essential element of a Sherman Act violation, and that he made no reference to possible punishment. Plainly, his remarks were not improper.

b. Petitioners next argue (Pet., No. 79, pp. 70-74) that the trial judge treated one of their counsel with marked hostility. To support this allegation, they rely on three instances in which the court cut off further argument by him. These isolated fragments of colloquy do not give a true picture of what occurred. The full record shows that in each instance the court found it necessary to silence counsel because of his persistent attempts to continue arguing evidentiary questions after the court had ruled upon them.[10]

c. Similarly without merit is petitioners' con-

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[10] For example, petitioners refer to pages 682-683 of the record, where the court refused to listen to further argument from their counsel, Mr. Schullman, and directed him to "Be quiet—sit down" (R. 683). Just prior thereto, petitioners' co-counsel, Mr. Richards, had shown a document to a witness, and the court had directed the witness to read the document to

tention (Pet., No. 79, pp. 74-76) that the judge showed bias in favor of the Government because he denied as untimely petitioners' motion to strike evidence, while allegedly granting like motions by the Government. Petitioners' motion was to strike a series of questions and answers covering two pages of the transcript, and the motion admittedly was withheld until that line of questioning had been completed (R. 533-535). The court denied the motion for failure to make timely objection to the various questions when asked (R. 535). The Government's motions, to which petitioners refer, were made under entirely different circumstances. Twice in succession, defense counsel asked a question which was answered "Yes" before Government counsel had a chance to object (R. 1089-1090). He did so immediately after the answer had been given, and each time the objection was sustained (*ibid.*). Obviously, the objection of Government counsel was timely.

d. Finally, petitioners argue (Pet., No. 79, pp. 81-88) that the district court erred in denying their motion for a new trial on grounds of newly discovered evidence. This evidence was that several months after petitioners were convicted, the stockholders of the Las Vegas race track filed a petition in bankruptcy, and criminal complaints were is-

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himself, since it was not in evidence (R. 682). Mr. Richards had the document marked for identification and then, without offering it in evidence, attempted to read from it. The court, applying settled law, refused to permit Mr. Richards to read from something not in evidence. It was at this point that Mr. Schullman attempted to argue the ruling further, and the court found it necessary to silence him.

sued against certain race-track officials. Clearly, as the district court stated (Supplemental Transcript, Oct. 7, 1952, p. 18, not printed) in denying the motion, such evidence was not "material to the issues involved in this case." The Government never contended that the strike at the race track was due to petitioners' conspiracy. Indeed, Government counsel told the jury in his opening argument that the race-track strike "is no part of this case" (R. 1426). Since the proffered evidence would have been irrelevant and inadmissible at any retrial, there was no basis for the motion for a new trial.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and the petitions present no important question of federal law. The petitions for writs of certiorari should be denied.

Respectfully submitted,

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JULY, 1954.

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IN THE

Supreme Court of the United States

October Term, 1954.
No. 79
(October Term, 1953
No. 766)

LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HYNDS, DON MCGARVIE, and BERNARD V. PROVENZANO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

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LAS VEGAS MERCHANT PLUMBERS ASSOCIATION, MERCHANT PLUMBERS EXCHANGE, INC., A. R. RUPPERT PLUMBING & HEATING COMPANY, UNITED PLUMBING AND HEATING COMPANY, A. R. RUPPERT, JOE DAVIS, RUBEN COHEN, JACK HYNDS, DON MCGARVIE, and BERNARD V. PROVENZANO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Las Vegas Merchant Plumbers Association, Merchant Plumbers Exchange, Inc., A. R. Ruppert Plumbing & Heating Company, United Plumbing and Heating Company, A. R. Ruppert, Joe Davis, Ruben Cohen, Jack Hynds, Don McGarvie, and Bernard V. Provenzano, pray for a rehearing of the Order of this

Court made on October 14, 1954, denying their Petition for Writ of Certiorari, and predicate their request herein upon the following grounds:

I.

There Is a Conflict and a Divergence of Substantial and Major Importance in the Decisions of the Several Circuits of the United States Court of Appeals, With Respect to the Submission to the Jury of the Question of Whether Commodities Involved Are, in Fact, "in Interstate Commerce."

The decision of the Ninth Circuit of the United States Court of Appeals in this case (210 Fed. 2d 732), affirming the judgment of the Trial Court, virtually accepted the reversible error which was committed by the Trial Judge in failing to submit to the jury the question of whether the commodities involved were, in fact, "in interstate commerce."

The denial of the Writ of Certiorari by the United States Supreme Court does not involve any decision upon the merits of the case, and imports to that Court no view upon the merits of the controversy.

U. S., ex rel. Cook v. Dowd, 180 Fed. 2d 212, vacated 340 U. S. 206;

Beal v. U. S., 182 Fed. 2d 565, cert. den. 340 U. S. 852.

Hence, the denial by this Court of the Writ of Certiorari leaves the ruling by the Ninth Circuit of the United States Court of Appeals with the legal proposition that the determination of whether or not commodities are in interstate commerce is a question of law and need not be submitted to a jury for a factual determination.

Similar questions have been presented to other Circuit Courts of the United States of Appeals and, as a result, there are completely inconsistent rulings of major importance, and a conflict arises to determine whether the decision of the Ninth Circuit of the Court of Appeals in this matter is the correct decision, or whether the decision of the other Circuits recognizing the necessity of submitting such questions to the jury, as questions of fact, represent the correct law.

This can only be resolved by granting this Petition for Rehearing and having the matter fully heard and determined by this Supreme Court of the United States.

The Record has been thoroughly set forth in the Petition for Writ of Certiorari. For the present purpose, however, it is sufficient to say that the commodities involved represented goods which came to rest at their point of destination. They remained at their place of destination for undetermined and long periods of time before any of the acts complained of in the Indictment took place, and that admittedly after the acts complained of took place, the goods in question became part of and were intermingled with the real estate of the state, never to be moved again in the channels of interstate commerce.

The jury at the trial had not been charged by the Court or received instructions with respect to the activities of Petitioners as affecting commerce in any manner whatsoever.

The Trial Judge in Instruction No. 26 [R. pp. 130-131] practically advised the jury that the goods involved had been shipped in interstate commerce. It has been and is the position of the Petitioners that the effect on interstate commerce is a basic issue to federal juris-

diction. Nevertheless, in Instruction No. 26, the Trial Judge practically told the jury to disregard whether or not the goods had come to rest within the state, and took from the jury the question of whether the acts of Petitioners had, in fact, any effect upon the interstate flow of goods. As a result, the Trial Judge destroyed the entire rule, by judicial precedent, as set forth in many cases in this Court and by the decisions of other circuits of the United States Court of Appeals, which draw a line between acts subject to federal jurisdiction under the Sherman Act and those acts purely within the state and intrastate and, therefore, beyond the reach of the Sherman Act.

The Trial Court refused Defendants' Instruction No. 18 [R. pp. 75-76], which would have remedied this defect and permitted the jury, as a question of fact, to make its determination.

In the trial, the uncontradicted testimony, both from government witnesses and Petitioners, established: that the purchases indirectly were made from out of town sources, and except in rare instances, remained on the shelves of the plumbing contractors and wholesalers within the State of Nevada for long periods of time; that the supplies, such as valves, fixtures, fittings and so forth, had to be processed and combined with other supplies in order to be utilized; that pipe had to be cut, fitted and treated before installation; that the processing of various plumbing and heating supplies normally took place in the shop of the plumbing and heating contractor, or, in rare

instances, where the particular job was of a character that the physical layout of the contractor could not accommodate fabrication in the shop, the work was done on the job. Accordingly, the contractors and Petitioners were "selling" services and their skill in order to apply fabricated commodities to be put *at rest* and become *part of the realty within the state.* [R. pp. 392, 447, 572, 586, 943, 944, 1075, 1232.]

On the basis of the facts before the jury, the jury could have found, and we submit, would have found, if properly instructed, that as a matter of fact, there was no interstate commerce.

In *Brosius v. Pepsi-Cola Co.,* 155 Fed. 2d 99, the Third Circuit Court supported the factual determination with respect to the flow of commerce and cited both the First, Tenth and Seventh Circuit Courts on the same issues, citing *Lipson v. Socony-Vacuum Corporation,* 87 Fed. 2d 276 *Jewel Tea Company v. Williams,* 118 Fed. 2d 202, and *Walling v. Goldblatt Brothers,* 128 Fed. 2d 778.

Not only does the conflict exist among the several Circuits, but most importantly, the decision of the Ninth Circuit Court in this case is contrary to the decisions of this Court. In *Walling v. Jacksonville Paper Co.,* 317 U. S. 564, the importance of a factual finding on the question of final destination and coming to rest in the flow of goods, interstate, was coruscatingly established; and where shipment was made of stock items and came

to rest intrastate, such goods were held not be in interstate commerce.

In the instant case, the Trial Court compounded its error in Instruction No. 25 [R. pp. 128-130], which reviewed the allegations of the Indictment and practically told the jury it was not to consider whether the goods were uninterrupted in their interstate movement, but urged the substitute concept of law that a violation of the Sherman Act can be found if there has been a conspiracy to fix prices for goods which at any time or under any circumstances find their way into a state from an out of state source as long as the alleged conspirators are "an integral part of and necessary to" the interstate movement of the goods. This, again, is in variance and in conflict with the decisions of this Court and with other federal courts.

This is emphasized in the case of *U. S. v. National Assn. of Real Estate Boards,* 339 U. S. 485, 492, 70 S. Ct. 711, 716 (1950), which cited with approval *Hopkins v. U. S.,* 171 U. S. 578, and *Anderson v. U. S.,* 171 U. S. 604.

Of course, in the *Real Estate* case, interstate commerce was found because it occurred in the District of Columbia. Mr. Justice Douglas, at page 492, stated:

> *"Hopkins v. United States,* 171 U. S. 578 * * * and *Anderson v. United States,* 171 U. S. 604 * * * are not opposed to this conclusion. It was held in those cases that commission merchants and yard traders on livestock exchanges were not engaged in inter-

commerce even though the livestock moved across state lines, *cf. Stafford v. Wallace,* 258 U. S. 495 * * *, and therefore that the rules and agreements between the merchants and traders (which included in the Hopkins case the fixing of minimum fees) did not fall under the ban of the Sherman Act. But we are not confronted with that problem here. As noted, we are concerned here not with interstate commerce but with trade or commerce in the District of Columbia."

Mr. Justice Jackson dissenting at page 496, stated:

"If real estate brokerage is to be distinguished from the professions or from other labor that is permitted to organize, the Court does not impart any standards for so doing.

"It is certain that those rendering many kinds of service are allowed to combine and fix uniform rates of pay and conditions of service. This is true of all laborers, who may do so within or without unions and whose unions frequently do include owners of establishments that employ, others, such as automobile sales agencies. See, for example, *International Brotherhood of Teamsters, etc. v. Hanke,* 339 U. S. 470, 70 S. Ct. 773. I suppose this immunity is not confined to those whose labor is manual and is not lost because the labor performed is professional. The brokerage which is swept under the anti-trust laws by this decision is perhaps a border-line activity. However, the broker furnishes no goods and performs only personal services. Capital assets play no greater part in his services than in that of the lawyer, doctor or office worker. Services of the real estate broker, if not strictly fiduciary, are at least those of a trusted agent and, oftentimes, advisory as to values and procedures. I am not persuaded that

> fixing uniform fees for the broker's labor is more offensive to the anti-trust laws than fixing uniform fees for the labor of a lawyer, a doctor, a carpenter, or a *plumber*. I would affirm the decision of the court below." (Emphasis added.)

The most recent decisions of *United States v. Employing Plasterers' Association*, 74 S. Ct. 452, and *United States v. Employing Lathers' Association*, 74 S. Ct. 455, do not change the conflict in law between the decision of the Ninth Circuit Court in the instant case and the other Circuit Courts and this Court. In the *Plasterers* and *Lathers* cases, the Court held as legally sufficient the language of indictments, but as a matter of fact, in the *Plasterers* case, 74 S. Ct. at 454, the opinion recognized the requirement that allegations of an indictment must be supported by the evidence and, of course, such evidence on such questions of fact, are always questions for the jury.

It is necessary, therefore, to resolve these conflicts of the law. It is of importance to the Petitioners and to every small business man, so that out of the confusion that exists with respect to their activities which may be deemed to be purely legal under the state laws, such small business men may be properly advised by a decision of this Court as to exactly what they can and cannot do in such matters, and have, at least, the judicial certainty that such questions of fact will be submitted to a jury.

II.

The Sherman Anti-trust Law, in the Case Before This Court, Was Applied and Administered by the Public Authority With an Evil Eye and an Unequal Hand With Respect to the Petitioners Herein.

Yick Wo v. Hopkins, 118 U. S. 356.

In exactly the same kind of case, involving practically the same facts, except a different group of plumbing contractors, the Justice Department and the Federal Court of Nevada agreed to and accepted a consent arrangement whereby the contractors permitted the entry of judgment, but the judgment stipulated that there was no finding that anti-trust laws were violated.

On November 15, 1952, the RENO EVENING GAZETTE published the following announcement.

"PLUMBING BID PRACTICES SET IN COURT FINDING.
Judgment Entered by Consent in Federal Court.

Approved Friday afternoon in federal district court was a consent judgment which ended civil antitrust action by the government against the Reno Merchant Plumbing and Heating Contractors, Inc., a trade association, and 14 of its master plumber members.

The Government in its 1950 complaint alleged the defendants were controlling contract bidding in such a fashion that free competition was stifled.

NO VIOLATION.

The judgment, accepted by both sides, *made no finding that antitrust laws were violated.* It did, however, list conditions under which bidding must be accomplished.

> Federal Judge Roger Foley, who was in Reno supervising pre-trial conferences for coming federal cases in Carson, signed the judgment.
>
> It was prepared by Charles F. B. McAleer of the judgment and judgment enforcement section of the antitrust division, under the supervision of Edwin H. Pewett, acting chief of the section. The case was handled by Wallace Howland and Lyle L. Jones of the San Francisco, Calif., office of the antitrust division * * *". (Emphasis added.)

In the Reno case referred to above, it was the same Justice Department, the same Federal Judge, and practically the same set of facts, yet *there was no criminal indictment and no requirement* that anyone plead *nolo contendre* or stipulate to violation of the Sherman Anti-Trust Law.

The policy of the Department of Justice presently seems to follow more equitably the *Yick Wo* decision.

In the Los Angeles Times of July 17, 1953, page 1, Part II, there appeared an article as follows:

> "Administration Will Enforce Antitrust Laws, Says Barnes.
>
> Persecution in Some Past Cases Hinted.
>
> "President Eisenhower and Atty. Gen. Brownell are very much convinced that the antitrust laws must be enforced. But they believe that they have, perhaps, in the past been in some instances an example of *persecution* rather than proper prosecution." (Emphasis added.)

This policy accentuates the apparent injustice in the prosecution of the present case and makes it imperative that as a question of fact, whether the commodities were in interstate commerce, should have been submitted to the jury.

III.

The Decision by the Ninth Circuit of the United States Court of Appeals, on the Case Herein, Creates a Conflict With Respect to the Question of Intent.

The Trial Court in Instruction No. 18 [R. p. 123], Instruction No. 19 [R. p. 124], Instruction No. 20 [R. p. 125], and Instruction No. 22 [R. p. 126], charged the jury with respect to a conspiracy, but omitted therefrom any reference to the concept of intent on the part of the Petitioners with respect to any agreement and its effect upon interstate commerce.

If, as a matter of fact, there was no intent on the part of the Petitioners, or if such intent had an indirect effect of no consequence or substance on interstate commerce, there could be no conviction.

> *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 211, 229, 234, 235;
>
> *Schechter Poultry Corp. v. United States,* 295 U. S. 495, 547.

Petitioners, however, offered instructions on the questions of intent, which instructions were rejected by the Trial Judge [Defendants' Proposed Instructions Nos. 12, 14, 15, 22 and 24; R. pp. 68, 69, 71, 79, 80-81].

> *United States v. Park Motors* (1952, U. S. Dist. Ct. for Tenn, N. D.), 107 Fed. Supp. 168.

In the trial of this case [R. pp. 1154-1155], one of the Petitioners and Defendant testified that they had legal counsel with respect to the association. At page 1155 of

the Record, Bernard V. Provenzano, on direct examination, testified, as follows:

> "Q. Will you tell us the circumstances under which counsel were engaged, what happened thereafter and what happened in respect to papers and documents as indicated by Exhibit 55? Very brief. A. We had a meeting in my office, at which there were five or six of us and we had previously called Mr. Coulthard to meet with us at that time and we discussed with him what we would like to do and asked his legal advice as to what we were planning, if we could in any way get into trouble, and he said, 'There is nothing here.' We said, 'In that case, we would like to organize,' and I gave him the names of everybody present. In the meantime Bill went to the Legislature, never had the papers drawn up."

In the trial [R. pp. 1197-1208], Counsel for Petitioners, in the absence of the jury, offered to put in evidence Defendants' Exhibit "A," a document issued by the Government of the United States, entitled "Establishing and Operating a Heating and Plumbing Business," issued particularly by the United States Department of Commerce, and offered to prove that it was used at the meetings of the Petitioners, read at their meetings, used as a guide and as an absolute method of bids. The Court rejected this offer, and denied the admission of said Exhibit "A" in evidence.

We believe this testimony was material to the question of intent with respect to the charge in the Indictment, and should have been admitted in evidence for the consideration of the jury.

Morissette v. U. S., 342 U. S. 246 (1952).

In *Times-Picayune Pub. Co. v. U. S.*, and *U. S. v. Times-Picayune Pub. Co.*, consolidated and decided May 25, 1953, in 345 U. S. 594, this Court reversed the District Court's judgment with respect to newspapers utilizing a unit newspaper advertising plan. This case is significant in that the Court held that since the compulsory combination advertising contracts which forced the advertiser to purchase space in the evening newspaper as part of the price of access to the single morning newspaper, *were motivated by legitimate business aims, the government failed to establish the specific intent essential to sustain an attempt to monopolize under the Sherman Act.*

Both as to the facts and the law, this case is on all fours with the instant matter before this Court on the question of specific intent.

IV.

The Misconduct of the United States Attorney in His Closing Argument, in Referring to the Nature of the Punishment, Denied Petitioners a Fair Trial and Due Process.

The decision by the Ninth Circuit of the Court of Appeals in this case, and on this matter, again creates a conflict not only with various state decisions but with federal decisions. The United States Attorney in his closing remarks to the jury, with particular emphasis, stated [Tr. pp. 1450-1451], as follows:

> "As my friend, Mr. Schullman, pointed out this afternoon, the use of the word 'conspiracy' is no crime. The Court will instruct you that in an anti-trust case there is no specific criminal intent necessary. *The offense againts the anti-trust laws is not a felony.* But that is not required, what lawyers call

criminal intent. You all know that in a murder case it must be proved, not only was the murder committed, but it was committed with malice aforethought. That is not involved here. We have here a statute which more than sixty years ago *Congress enacted to be a misdemeanor. You have many ordinances in your own communities which are misdemeanors. One of the ones which all of us run afoul of most frequently perhaps is overrunning a stoplight with an autombile.* Now it doesn't make any difference whether you went through the *red light* and whether you saw it or didn't or intended to violate the law or didn't, doesn't make any difference. If a law enforcement officer sees you doing it, he gives you a ticket *and you are charged with a misdemeanor,* a violation of an ordinance, which says you should not go through a *red light.*

"The Sherman Act is *simply an act reserving* (*sic*) competition in business where there is an effect upon interstate commerce.

"It gives a green light to businessmen who act independently of each other in fair and open competition, and *it gives a red light* to combinations and associations of businessmen who act collectively and in concert to suppress competition of others." (Emphasis added.)

This deprived the Petitioners of a fair trial and of due process, since it took away from the jury the right of a free determination. Many weeks having elapsed in the trial, and the Government having gone to great expense, the remarks of the United States Attorney made it "easy" for the jury to find the Defendants guilty of a slight misdemeanor comparable to a traffic violation of going through a red light, the jury feeling secure that there

would be nothing but a small fine. That is the only conclusion to be drawn from such remarks of the United States Attorney, and the Trial Court refused to correct the error.

In *People v. Kirkes,* 39 Cal. 2d 719; *People v. Byrd,* 42 Cal. 2d 200 (1954); *People v. Afarian,* 108 N. Y. S. 2d 533, and in *Mendelson, et al. v. United States,* 58 Fed. 2d 539 (1932, D. C. Ct. of Appeals), remarks similar to those made in the instant case were held to be most improper.

As the Court said in the case of *People v. Afarian,* 108 N. Y. S. 2d 533, at page 538:

> "It is most improper to urge a conviction by means of an assurance of a soft penalty."

In *People v. Beal,* 116 Cal. App. 2d 475 (1953), at page 477, the Court said:

> "That the argument of the district attorney was highly improper and constituted prejudicial misconduct compelling a reversal is not debatable. In the recent case of *People v. Kirkes,* 39 Cal. 2d 719, the district attorney made substantially the same argument to the jury as was made in the present case * * * ."

In *Berger v. United States,* 295 U. S. 78 (quoted with approval in *Vierick v. United States,* 318 U. S. 236), at page 88, the Court said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be

done. As such, he is in a peculiar way and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. *It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use very legitimate means to bring about a just one.*" (Emphasis added.)

Conclusion.

It is respectfully urged that, for the foregoing reasons, and so as to secure a conformity of decisions with respect to these major, important and substantial matters, this Court grant a rehearing, and Petitioners respectfully pray therefor; since these matters not only are serious as affecting these Petitioners, but the law on these matters remains in a state of conflict between the several Circuits and, in fact, is in conflict with the decisions, enunciated by this Court itself.

Therefore, it is respectfully suggested, and again requested by Petitioners, that this Petition for Rehearing be granted, and this case be heard by this Court.

Respectfully submitted,

ALEXANDER H. SCHULLMAN,
RICHARD RICHARDS,
DAVID ZENOFF,
By ALEXANDER H. SCHULLMAN,
Counsel for Petitioners.

Dated: November 4, 1954.

Certificate of Counsel.

The foregoing Petition for Rehearing, in the judgment of all Counsel for Petitioners, and to which they herewith certify, is well founded with respect to the points of law, and that this Petition has been presented and filed in good faith and has not been interposed for the purpose of delay. Counsel for Petitioners further certify that they have sincerely followed the requirements of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954, particularly Rule 58, and that the Petition is restricted to other substantial grounds available to Petitioners although not as pointedly presented previously, and, in certain respects, not previously presented at all.

ALEXANDER H. SCHULLMAN,
RICHARD RICHARDS,
DAVID ZENOFF,

By ALEXANDER H. SCHULLMAN,
Counsel for Petitioners.